

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-2115

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- X

UNITED STATES OF AMERICA,

Appellee,

Docket No. 74-2115

-against-

ISMAEL RIVERA,

Defendant-Appellant.

----- X

BRIEF AND APPENDIX ON BEHALF OF APPELLANT



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BRIEF ON BEHALF OF APPELLANT

PRELIMINARY STATEMENT

The appellant, ISMAEL RIVERA, appeals from a judgment of the United States District Court for the Southern District of New York, (Wyatt, D.J.), rendered after a jury trial on August 15, 1974, convicting him of murder of a narcotics agent, assault on a narcotics officer and assault with a weapon on a narcotics officer, in violation of 18 U.S.C., Sections 111, 114 and 2114. He received a sentence of life imprisonment.

This action was tried to a jury from June 10, 1974 to June 21, 1974. A previous trial before United States District Judge Knapp resulted in a hung jury.

## STATUTES

### 18 U.S.C. Section 1111

#### Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

### 18 U.S.C. Section 1114

#### Protection of officers and employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention

of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration, directed to guard and protect property of the United States under the administration and control of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare or of the Department of Labor assigned to perform investigative, inspection or law enforcement functions, while engaged in the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

18 U.S.C. Section 2114

Mail, money or other property  
of United States

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

FACTS

The appellant was charged with the killing of FRANK TUMILLO, an agent of the Narcotics Bureau, on October 12, 1972, at the Sheraton Motor Inn in Manhattan. It was not claimed that he participated in the actual shooting but the theory of responsibility was based on aiding and abetting, it being the contention that appellant may have been the driver of the intended getaway car.

JEFFREY R. HALL, a narcotics agent, said that on October 11, 1972, at 8:00 P.M., he met with the deceased agent, TUMILLO, and a woman

informant. The lady promised them an introduction with one JOSE NIEVES, who was waiting in her apartment and was prepared to sell ten kilos of cocaine\*( 149). After an initial meeting with NIEVES, the agents got authorization to make the transaction and they returned to the informant's apartment with \$160,000.00 in their possession, the price being \$16,000.00 per kilo (50).

Agent TUMILLO entered the apartment and a short time later he came out, announcing that NIEVES was going to introduce them to his connection and they were to return at 9:30 P.M. (51). The agents returned about 9:45 P.M. and NIEVES and another informant, JOSE MARFUL, got into the car. The money was exhibited to NIEVES and he directed them to a building on 161st Street. NIEVES went into the building and after coming out a few times he said that the transaction was postponed until the next night. (53)

The next night, October 12th, the agent was in Room 1007 of the Sheraton Motor Inn at 9:00 P.M. TUMILLO was supposed to bring NIEVES to the room to complete the drug transaction (54-55). At 9:30 P.M. NIEVES and MARFUL came in and then TUMILLO came in with JOSE MATTA (57). HALL dumped the money on the bed and after it was counted it was agreed that MATTA and NIEVES would get the cocaine and return in two hours. They would meet TUMILLO in the lobby who would give them the key to another room. They would deposit the cocaine in the second room and one of them would come to HALL's room and the money and cocaine would be

\*References are to pages of trial minutes

exchanged in both rooms (58). MATTA said that they had a man to take them downtown and the meeting ended.

The witness and some other agents then returned to Room 1005 where they secured the money and made some telephone calls regarding another case. Suddenly a shot was fired in the next room, and Agent CAFFREY jumped up and kicked at the door adjoining the two rooms and ran into the hallway. HALL succeeded in kicking the door in and he went into Room 1007. NIEVES was crouched behind the door and he and HALL fired at each other but missed. MATTA was behind the door, also shooting. Shots were exchanged and the witness saw Agent TUMILLO lying on the floor and Agent DEVINE lying behind the connecting door (62-63). NIEVES and MATTA ran out the front door into the hall where CAFFREY was waiting, and after all the gunfire ended, NIEVES and MATTA were dead in the hall, TUMILLO was dead in the room and DEVINE was wounded. The witness stayed in the room and CAFFREY took custody of the currency (64-66).

On cross examination the agent said that at no time did he see appellant nor was appellant's name ever mentioned (67). In addition, there were numerous agents in the lobby and outside the hotel who also apparently did not see RIVERA.

ROBERT E. GRANT, another agent, posed as a hotel clerk and he described NIEVES and MATTA coming into the hotel with TUMILLO, leaving shortly thereafter, only to return about 10:30 P.M. (78-81). Another agent, PAUL SENNETT, described tailing NIEVES, MATTA and TUMILLO that night, describing their movements which eventually ended with their arrival at the Sheraton Motor Inn (85-88). When he arrived he was

stationed in Room 1005 to safeguard the money. Agent CAFFREY let him into the room and once he was in, a short time later he saw Agent DEVINE walk through the adjoining door. The shooting started, and because he could not break down the door, he ran into the hall with Agents CAFFREY and HALL. Shots were exchanged as NIEVES and MATTA exited from the room, which resulted in both men being killed (88-89). At no time did he ever see RIVERA.

RONALD CAFFREY similarly described the shooting (95-97), but after it was over, he retrieved the money and left the hotel to give it to Agent HUNT who was in his car, stationed across the street from the entrance (105-106).

He came out of the hotel and noticed several cars in the area, but he heard what seemed to him to be the sound of a car "peeling out" or accellerating from a stopped position, apparently from the side of the hotel (105-106). He never saw the car, could not tell in which direction it was going (106) and, in fact, Agent HUNT later testified that he did not notice a thing (411-412). Nor did he hear anything to make him think an escape was going on. In addition, the shooting occurred at ten minutes to 11:00 and he heard the car leaving just a few minutes before 11:00 P.M. (152)

This was the only evidence in the case to put RIVERA near the scene, except highly questionable admissions, since no one saw appellant or his car anywhere in the area. In fact, RIVERA was in an accident just ten minutes later, at the most, at the Brooklyn side of the Battery Tunnel. Subsequently, on September 28, 1973, he questioned appellant

and was told that he could not have been with NIEVES and MATTA that night because he had an accident and was in jail at 10:00 P.M. (111)

THOMAS J. DEVINE also told of the shooting (175-177), again with no involvement of the appellant (169) and he identified the pistol MATTA shot him with, an unusual 35 caliber gun, although millions are manufactured (179-181).

The only real witnesses against appellant were convicts who testified to alleged statements of appellant that were apparently incriminating. Thus, HECTOR VIGO, who had just been released from prison on a cocaine charge, said he once was the manager of the Midway Bar on 8th Street in 1972 (218). He knew RIVERA as "PEQUILINO". He at first did not recall if RIVERA was in his bar two days after the shooting. Then he did not remember any conversations with him (223-224), but after the witness was impeached, with great tediousness, by his own Grand Jury testimony (233-236), he said that RIVERA had said the shooting was in a hotel and he had to leave. The prosecutor asked whether he had testified in the Grand Jury that RIVERA told him he was waiting downstairs for NIEVES and MATTA, but something went wrong and he heard the shooting and left. He also said he was going to leave for Puerto Rico because of the shooting.

The witness, however, still said that he did not recall the conversation, and if he gave those answers in the Grand Jury, he lied (232). The transcript was marked in evidence (223).

VIGO said that the F.B.I. and the police threatened him that if he did not testify they would take away his child and put his wife in

jail (236). That was the reason he lied. All the details were furnished by the police (246-147). Special Agent FERRARONE and Detective SIERP did the threatening (251). The bulk of his testimony consisted of cross examination and impeachment by the prosecutor, who constantly read his Grand Jury testimony to the trial jury (268-270).

He also said that he told his wife he was cooperating, a circumstance which made her claim she was now in danger. Of course, she did not want him to cooperate (280). He also said that his wife said two men had threatened her on the street because her husband was talking (282). Still, the reason he was not testifying now was because his Grand Jury testimony was untrue, not because he was afraid for his wife (283,287,289).

Counsel astutely observed that the government had created a situation where it was allowed to obtain unfair advantage by putting on a witness it knew would be recalcitrant, thus enabling the prosecution to show threats, impeach its own witness and use Grand Jury testimony as evidence in chief, which it normally could not do (305-309). Yet, the witness still maintained that the police visited him in The Tombs, threatened him and told him what to say (315-323). The conversation with his wife had nothing to do with changing his mind, he just did not want to tell lies (326). He also said that RIVERA never threatened him.

Naturally, Detective SIERP denied threatening VIGO or doing anything wrong (338-353). Counsel again objected to the entire area of testimony as being collateral, to no avail (376-377).

The next witness was Agent HUNT, who testified that he was outside the hotel and could not hear a car "peeling off" (411-412). Also, he did not hear the sounds of gunshots in the street since he knew nothing about the shooting until CAFFREY came out and told him (437).

A long discussion ensued as to the use of VIGO's Grand Jury testimony, the ruling being that if the jury believed it, it could be used as evidence in chief (455-456).

Agent SILVESTRO then testified that VIGO's statements were voluntary and that he had not been threatened by Agent FERRARONE or anyone else, (508-515) and at one point he heard RIVERA tell FRANK TORRES that he told the wrong man (529). On cross the witness admitted that VIGO had complained that he had been threatened and his Grand Jury testimony was a lie (542-543).

DONALD FERRARONE then testified that he had not threatened VIGO and that VIGO really changed his mind after a discussion with his wife (574-656).

Except for a technical witness, who established that it was 5.8 miles from the West Side Highway entrance at 42nd Street to the toll plaza on the Brooklyn side of the Battery Tunnel (559), more than two hundred pages of transcript involved the collateral issues of whether VIGO was threatened.

Agent FERRARONE also described the government's investigation, and at one point he said that their investigation was directed at looking for a car that had fled the scene because Agent HUNT had heard it

drive away (611). It will be remembered that HUNT denied seeing or hearing anything (411-412). FERRARONE also admitted that RIVERA did not go to Puerto Rico until three or four months after the shooting, hardly a man in flight (636). In addition, he admitted that a MR. SILVERBERG was supposed to be in the transaction with NIEVES. MATTA only came in when it was discovered that SILVERBERG was high. RIVERA was never mentioned (637), except that supposedly SILVERBERG was told by a man, double hearsay, that RIVERA attempted to get the gun back after the shooting (646-647).

WALTER MASSEY PHILLIPS, JR., an Assistant United States Attorney, who questioned VIGO in the Grand Jury, testified that he knew nothing of any threats (656-662). Yet he was never even told that at one point VIGO changed his mind about testifying (663), so that the agents and police may not have been fully candid with their prosecutor.

The prosecution called an expert witness, a patrolman who had occasion to make speed runs from 42nd Street to Brooklyn, and at high speed, averaging eighty miles per hour, it took only four to four and one-half minutes (669-670). Appellant later put on two taxi cab drivers, also experts, who travelled the area many times, and they said it was impossible. It had to take twelve to fifteen minutes (1270-1275, 1277).

Then JOSEPH CAPORICCI, a patrolman, testified that he was off duty on October 12th, attending a hockey game at Madison Square Garden. He left the game at 10:30 P.M., got his car out of the parking lot and proceeded down the West Side Highway (678-679). He went through the tunnel and as he came out in Brooklyn, a car suddenly overtook him and

struck him from the rear pushing it up against the concrete platform (680). The witness got out of his car and when he attempted to exchange registrations, RIVERA attacked him without warning, punching him in the face. A melee ensued after RIVERA's wife tried to break it up which included CAPORICCI's friend, who had been a passenger in his car (680-681). Finally, the witness arrested RIVERA and eventually took him to the precinct (682-689). MRS. RIVERA drove away and he noticed what looked like a revolver in RIVERA's car but the gun never turned up again (685-686). Some 35 caliber bullets were found on the ground but RIVERA said they were not his (694). The arrest was for assault, possession of a weapon and intoxicated driving (696).

RIVERA refused a technical drunkenness test in the precinct but the police gave him a balance test, his speech was slurred and the observations of the police officer, including alcohol on RIVERA's breath, led him to conclude that he was drunk (720,733-735). The theory of the prosecution is thus made more incredible. According to the government's evidence, MATTA only came into the adventure because SILVERBERG was high, yet the jury was asked to believe NIEVE's acceptance of RIVERA, who was drunk, and that RIVERA in that state negotiated the 5.8 miles at an extremely high speed and reached Brooklyn without killing himself. Since the officer did not know of the shooting when he arrested RIVERA he had no reason to lie about RIVERA's condition. It is no doubt true that RIVERA was intoxicated, a fact which highlights the weakness of the government's case. Were it not for the fact that the charges were so serious, the evidence in this case would be comical.

The two friends of the officer supported his story of the accident and fight (792-820,820-826), and then ROBERT VIGO, HECTOR's brother, took the witness stand.

He said he was then in custody for drug infractions, and to say that he was a narcotics dealer of some importance is an understatement (827-829). He knew JOSE NIEVES from his brother's bar where they had discussed purchasing ten kilos of cocaine (829). On a second occasion RIVERA participated in the discussion of the quality of the ten kilos, but it is hard to see what that had to do with this case because the deal never went through, since RIVERA and NIEVES did not bring the money (830-833). He never saw RIVERA again. He also said that in June, 1974, he wrote his brother's wife a letter that he heard someone was going to kill HECTOR because he was testifying against him (834-835). Over strenuous objection the Court let all this evidence in on the issue of the state of mind of HECTOR VIGO (834).

The witness had been in jail for over a year, he still had five or six years ahead of him, but he was not merely testifying to help himself (834-840).

ANGEL JOGLAR, a businessman from Puerto Rico, identified RIVERA as the man who rented an apartment from him under the name of ISMAEL MONTE from April 6, 1973 to June 1, 1973, six months after the killing (872-880). Objections to the reliance of this testimony were overruled (882).

The last in the line of long standing narcotics dealers, just itching to tell the truth, was ARTEMIO ROSA. He was serving a ten

year sentence and had a raft of narcotics charges against him (889). Yet with all his charges, the government made no promise; they would simply report the facts to the Judge (890). On October 12, 1972, he was in a club and saw RIVERA. NIEVES and MATTA came in and engaged RIVERA in conversation (892). His testimony was a mass of contradictions, as he averred that when he said in the first trial that RIVERA said he was going to pick his wife up at Bingo, he was mistaken. It really was not until after RIVERA was arrested that RIVERA's wife told him that (894).

He saw RIVERA again on the 14th, two days after the shooting and RIVERA told him that federal agents were after him when he had an accident with a police car (896). When it happened, he attacked the officer to give his wife time to run away because there was a gun in the car (897). When asked if he knew about NIEVES and MATTA, RIVERA supposedly said that he was very lucky he had not been killed there (899). The witness also said that five or six months later he gave appellant \$10,000.00 to leave for Puerto Rico because the police were after him (899). The interesting thing is that Agent FERRARONE testified that at first the authorities did not know who to look for and at any rate no one was pursuing RIVERA on the West Side Highway. There was no reason why, two days later, RIVERA would have made those statements, yet not feel the necessity to flee for six months. Also, if an incriminating gun was in the car, RIVERA's wife did not seem to be in too much of a hurry to get away.

Later on, after RIVERA was arrested, the two men met in the

Federal House of Detention for Men and RIVERA attacked him. His wounds required three stitches. RIVERA told the other inmates that he did it because ROSA had "ratted" on him (903-905). The witness had a horrible record, he owed a lot of time and he was hopeful of getting his sentence reduced (917-922). On cross, he again testified that on the prior trial, when they left the bar, RIVERA said he was picking up his wife at Bingo. Now he said it was a mistake, RIVERA's wife really told him that after RIVERA was arrested (924-925). He also denied a statement he made in the first trial that he would not lie to implicate RIVERA (962).

MARIE TOMSCU, a waitress in the lounge at the Sheraton Motor Inn identified RIVERA as one she recognized from pictures as having been in the lounge that night (1007,1009,1064-1092, 1070-1071), but she could not identify the other two men, NIEVES OR MATTA. Incidentally, Agent TUMILLO, the agent who died, also looked like RIVERA. Another witness, LEE MURRAY, the bartender, picked out pictures of NIEVES and MATTA but he could not remember RIVERA (1022,1025,1035-1061). Both witnesses were allowed to testify as to earlier consistent identifications, even though their testimony had not been impeached. The female waitress, MARIE TOMSCU, was just sure that NIEVES and MATTA were not there as she was that RIVERA was (1089).

The government rested and motions to dismiss based on a total lack of evidence really tying appellant to the events as well as a failure to show that it was not the agents who started shooting first, were denied (1102-1104).

The appellant called WILLIAM SILVERBERG as his first witness. He was originally supposed to go on the job with NIEVES but he was high on drugs, so NIEVES took MATTA instead (1111-1112). NIEVES never said RIVERA was involved. If he had, SILVERBERG would never have agreed to participate, because he did not like RIVERA (1114).

BLANCHE RIVERA, the appellant's wife, testified that she went with her husband to his mother's house on 11th Street between Avenues B and C that night. After dinner she went to play Bingo with her niece about 7:30 (1131-1132). The Bingo game ended between 10:00 and 10:15 P.M. and she returned to the house. As soon as she got there, about 10:20 or 10:25 P.M., her husband was downstairs honking. She got into the car and they started for home (1136-1137). The Brooklyn Bridge was closed that night, so they proceeded to the FDR Drive to take the tunnel to get to their home in Staten Island (1138-1139). A subsequent stipulation established that the Brooklyn Bridge was indeed closed (1301).

The accident occurred when they came out of the tunnel and the fight ensued. Appellant was drunk and he took a bad beating because the cop's friend stomped on appellant's face requiring him to get four stitches (1143). There was no gun in her car. She was just delayed getting to the precinct because she got lost (1151-1156). At the precinct she was arrested also, for leaving the scene of an accident (1171). She and appellant did not flee the jurisdiction. They stayed in New York until the end of February, 1973, and only went to Puerto Rico because her baby had viral meningitis and was hospitalized (1173, 1180-1181). They used the name of MONTE in Puerto Rico because that

was his mother's last name, MONTALDO, and everyone there called him MONTE (1175). They never were given money by ROSA, but he told her in West Street that he had refused a deal to testify against her husband because it was a lie (1182-1184).

The appellant's mother verified that MRS. RIVERA played Bingo the night of the shooting and appellant picked her up about 10:30 P.M. (1255-1256). Appellant's niece, LYDIA PERERIA (1278-1283) and his nephew, RAFAEL GONZALEZ (1295-1298) corroborated her testimony.

DAVID GOLDMAN, a taxi driver, was qualified as an expert, and he said that because of the curves on the West Side Highway, it was impossible to get to Brooklyn via the highway in less than twelve to fifteen minutes (1270-1275). Another cab driver, DAVID FINKELSTEIN, said the same thing (1277).

The previous testimony of one CEREFINO GORDON was read into the record. It was to the effect that ROSA met him in jail and told him that appellant was innocent, yet if he testified against him, he would not be doing ten years (1304).

The government called FATHER JOHN DWYER in rebuttal. He said that the Bingo game ended about 10:30 P.M. on the night of the shooting (1314). MARY ANN BINGER, testified that the RIVERA's signed a lease for a brand new building, apparently to show that they did not really live in Staten Island (1336-1341), and ALEXANDER SINCLAIR, a postal employee said that there was no 224 Avenue C, but there was a 224 Avenue B (1344-1345). There was some other police testimony to the effect that the accident happened sometime after 11:05 P.M. (1346-1361).

Both sides rested and the defense motions were denied (1390).

In its charge, the Court specifically told the jury that in considering the testimony of HECTOR VIGO, they should consider which testimony was credible, his trial testimony or that which he gave before the Grand Jury. If they believed that his Grand Jury testimony was truthful, it could be considered for its truth and used as substantive evidence against appellant (1555-1556). The Court also allowed the jury to consider the issue of threats made to conclude consciousness of guilt (1557), yet there was no evidence that the threats were made by appellant. The issue of flight was also given to the jury (1557-1558) although, there too, it seems that the time gap may have made it too remote.

Objection was made to the use of the Grand Jury testimony, especially since the jury was not left with another option in addition to accepting one version or the other. That is, to believe neither, and a request was denied that if they believed the Grand Jury version, they had to do so beyond a reasonable doubt (1567).

The jury requested a list of witnesses and exhibits (1569) and over strong objection, the Court permitted the Clerk's list to be given to the jury, which also included the items marked for identification but not received in evidence.

At the time of sentence, various motions were renewed, including one to dismiss on the grounds that a government report showed that ARTEMIO ROSA was really the same person as one ARTEMIO GONZALEZ, who was first thought to be the person they were seeking. If that were

true, the spirit of Brady had been violated, since that evidence would have been extremely useful in cross examining ROSA (Minutes of Sentence, p. 13-14).

POINT I

THE EXTENSIVE USE OF THE GRAND JURY TESTIMONY  
OF A KEY PROSECUTION WITNESS, AS WELL AS THE  
TAKING OF TESTIMONY ON THE COLLATERAL ISSUES  
IT LED TO, DEPRIVED APPELLANT OF A FAIR TRIAL.

As the statement of facts herein indicates, the evidence presented against the appellant in this prosecution was so circumstantial and indirect, that even in a light most favorable to the government one would have to say this was a very close case. No further indication of that fact is needed than to refer to the first trial having ended with the jury unable to agree on a verdict. The main witness against appellant was HECTOR VIGO, a convict who had just been released from prison on a cocaine charge (218). He was in a bar two days after the shooting and was asked questions about conversation he had with the appellant. He could not recall any and then was impeached by the government via the introduction of his own Grand Jury testimony, in which he told the Grand Jury that RIVERA said he was waiting downstairs at the hotel where the shooting occurred, but something went wrong and he left when he heard the shooting (223-224, 233-236). He also supposedly told the Grand Jury that appellant said he was going to leave for Puerto Rico because of the shooting.

VIGO denied that his Grand Jury testimony was truthful and, in fact, specifically claimed that he lied in the Grand Jury (232). He said that the F.B.I. and the police threatened him that they would

take away his child and put his wife in jail if he did not testify. That all of the details of his testimony were furnished by the police and that his testimony was a complete lie (236,247-247). He named the two officers who had threatened him (251) and basically the rest of his testimony consisted of cross examination and impeachment by the prosecutor, who constantly read the witness' Grand Jury testimony to the trial jury (268-270). A transcript of his Grand Jury testimony was actually marked into evidence, and the Court later charged the jury that if they believed the witness had been telling the truth when he testified in the Grand Jury, that Grand Jury testimony could be used for the truth of what was said and as evidence in chief against appellant (1555-1556,1557,1567).

The use of this Grand Jury testimony not only presented an issue with regard to the use of prior out of court testimony which was not cross examined which the witness on the witness stand specifically alleged was untrue, but it led to a further collateral issue which we believe seriously prejudiced the appellant. The prosecutor also introduced evidence on the theory that the reason VIGO had first testified at the trial was because he had been made aware of threats against his life because he was cooperating with the authorities, even though no one specifically testified that the threats came from the appellant. Thus, the witness was induced to reveal that his wife told him that two men on the street had threatened her, although the identification of the two men was never revealed (282). This also led to the prosecutor putting ROBERT VIGO, the witness' brother, on the stand, who said he wrote to his brother's wife in June, 1974, telling her that he

heard someone was going to kill HECTOR because he was testifying against him (834-835). Who that "someone" was was never revealed. This evidence was allowed in even though HECTOR VIGO maintained that his Grand Jury testimony was a lie and that the reason he changed his story was because it was a lie and not because of any threats (283-287,289). Counsel then observed that by putting HECTOR VIGO on the witness stand, knowing he would recant his Grand Jury testimony, the prosecution was getting more mileage out of a recalcitrant witness than it would have had VIGO merely repeated what he said in the Grand Jury. VIGO's statement that his Grand Jury testimony was a lie enabled the government to bring in evidence of threats which were not proven to have been made by or on behalf of appellant, but which nevertheless may have had a telling effect on the jury. In addition, the government presented many witnesses on the issue of whether threats had been made to VIGO, so that considerable time was taken up on that matter, which would not have been the case at all had not the Grand Jury testimony been introduced by the transcript and its contents. Thus, DETECTIVE SIERP testified and denied threatening VIGO or in any other coercing his testimony (338-353), even though counsel objected to the entire area as being collateral (376-377). Agent SILVESTRO testified that VIGO's statements were voluntary, and that he had not been threatened (508-515,529,542-543), and Agent DONALD FERRARONE also gave evidence that he had not threatened VIGO (574-656). In addition, the Assistant United States Attorney took the witness stand and said that he knew nothing of any threats (656-662). So it is interesting to point out that the agents never even told him that VIGO had changed his mind about testifying (663). It seems as

as though great doubt can be cast upon the integrity of the agents even as far as dealing with their own prosecutor.

It has always been recognized that the long established rule is that prior inconsistent statements, regardless of their nature, are never allowed into evidence except for the purpose of impeachment. Bridges v. Wixon, 326 U.S. 135, 153-154 (1945). That rule was recognized by this Court in United States v. Desisto, 329 F.2d 929, 933 (1964), as well as most commentators, McCormick Evidence 75-79 (1954), although it has been criticized in many quarters. The rule has also been followed in most jurisdictions, and no distinction has been made as to whether the prior hearsay testimony consisted of statements or evidence given before a Grand Jury. Grunewald v. United States, 353, U.S. 391 (1957); Cannady v. United States, 351 F.2d 796 (D.C.Cir. 1965); United States v. Dobbs, 448 F.2d 1262 (9th Cir. 1971); United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); United States v. Gregory, 472 F.2d 484, (4th Cir. 1973); United States v. Johnson, 427 F.2d 957 (5th Cir. 1970); Lerma v. United States, 387 F.2d 187 (8th Cir. 1968), cert. den. 391 U.S. 907; United States v. Miles, 413 F.2d 34 (3rd Cir. 1969, appealed after remand 468 F.2d 482; United States v. DeCarlo, 458 F.2d 358 (3rd Cir. 1972).

As we have mentioned, this Court has pointed out in Desisto that the rule has been criticized in many quarters. We think, however, that much of the criticism has come from commentators such as McCormick, who have criticized the rule solely on the basis of the idea that a man's earlier testimony could many times be more accurate than his later testimony because generally people remember better at a time closer

to the happening of a event. This reasoning may have merit in the abstract, but not one of the commentators recognized that other factors are much more important to preserve our inherent system of personal freedom, which includes the concept of a man being convicted only upon testimony that he is confronted with. People who criticize the rule do not take into account that the possibility of having false testimony introduced by an unscrupulous police officer or prosecutor exists to a much greater degree at the Grand Jury level than it does at any other time. When a person alleges, such as in the case at bar, that his testimony was untrue or that he was forced or wrongfully induced to give that testimony, the principle of having a lawyer present at the time the testimony is given becomes significant. The idea that a man's testimony might be more truthful upon the occasion when he gives evidence before a Grand Jury holds no merit. I am sure that this Court is aware that in many sections of our country there are movements to eliminate Grand Juries completely, on the grounds that they waste time and are a needless expense. In any event, whether one agrees with this idea or not, one can still recognize that there is substantial backing for such a movement, and that to a large extent the idea that Grand Juries do not perform a useful function has some merit. Inherent in this argument is the fact that Grand Juries usually hand down indictments whenever the prosecutor desires, and that witnesses generally will testify in a manner favorable to the prosecution, especially with intelligent prodding or direction on the part of law enforcement. Many people think that Grand Juries do not serve a valid purpose. Cer-

tainly the testimony induced before a Grand Jury should not have greater weight than any prior statements.

At any rate, this issue boils down to a determination of whether the exception granted in Desisto applies in the case at bar. In the Desisto case, this Court recognized the general rule and recognized that proof of an out of court statement was generally not admissible except for impeachment purposes. An exception was granted, however, with respect to trial testimony or testimony before a Grand Jury, and in that case the evidence was admitted for its truth. It should be noted, however, that a significant factor in that case was that the evidence adduced before the Grand Jury was merely an identification of a photograph of the defendant. United States v. Desisto, supra, Page 932. Desisto did not deal with Grand Jury testimony such as is present in this case, and Desisto did not deal with a situation where the witness himself said that his prior testimony was untrue or improperly coerced. These are differences which appellant contends control the case at bar and make the Desisto exception inapplicable. This Court recognized the exception in Desisto in United States v. Briggs, 457 F.2d 908 (2nd Cir. 1962), although that case only dealt with statements rather than Grand Jury testimony. Again, in United States v. Cunningham, 446 F.2d 194 (2nd Cir. 1971), cert. den. 404 U.S. 950, the exception was recognized. That case, like Briggs, did not involve Grand Jury testimony. Again, in United States v. Pacelli, 470 F.2d 67 (2nd Cir. 1972) it was made clear that the Desisto exception was not intended to be extended. That case also involved a statement given to

police rather than testimony before a Grand Jury.

The only case that specifically involved Grand Jury testimony was United States v. Insana, 423, F.2d 1165 (2nd Cir. 1970), cert. den. 400 U.S. 841, and we find the reasoning in that case merely points up the differences between the Desisto situation and the case at bar. In Insana, this Court said that certain situations could be present where a witness in good faith asserts that he cannot remember relevant events or that for some reason, such as a desire not to testify against someone, the witness refuses to testify, but he implicitly admits the truth of the extra-judicial statement harmful to the defendant. United States v. Insana, supra, 1170. The Court then said:

"Thus we believe that these statements are admissible not only to impeach his claim of lack of memory, but also as an implied affirmation of the truth. This conclusion is consistent with our qualification of the hearsay concept set forth in United States v. Desisto, ..."

Emphasis added, citation omitted. United States v. Insana, supra, 1170.

We believe that the Insana holding makes it clear that the intent of this Court was to allow Grand Jury testimony to be used only in situations where no issue was created regarding its truth or the method by which it came into being. Nothing could be clearer than this Court's statement that:

"Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to testify is not a lack of memory but a desire 'not to hurt anyone', then the court has discretionary latitude in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made."

United States v. Insana, supra, at 1170.

The case at bar clearly comes within the idea that Insana conveys. The case at bar involved a direct and substantial issue that the testimony in the Grand Jury was not true, and that it was induced by means of threats and improper coercion. In addition, in the case at bar the Grand Jury testimony involved a substantial amount of questions and answers, was read at great length by the prosecutor and led to testimony of a substantial nature and other collateral areas, such as threats made to the witness' wife and coercion on behalf of law enforcement. None of the cases which this Court has decided which permitted the use of Grand Jury testimony involved these issues. Even in Desisto itself, the only Grand Jury testimony that was involved was a simple identification of the defendant. That identification was also made in the prior trial, so that no real issue of the truth of the Grand Jury testimony was presetned. The facts of Desisto and several other cases do not resemble the facts in this case and the prejudice and dangers inherent in allowing Grand Jury testimony for its truth in a situation where the witness himself attacks that truth, is clearly indicated.

We think that since this case was close on its facts, and since the first jury failed to agree on a verdict, no one could say that the Grand Jury testimony, or even the testimony of the witness' brother regarding threats made, even though they were not proven to have come from the appellant, did not seriously effect the jury's deliberation. In such a situation it is hard to conceive how this appellant could have had a trial in keeping with our ideas of due process or his right

to confront witnesses.

POINT II

THE EVIDENCE IN THIS CASE WAS IN-  
SUFFICIENT TO SUPPORT THE CONVICTION.

Many times defendants are convicted of crimes on the basis of circumstantial evidence, but generally that evidence has probative value and the inference to be drawn usually excludes the possibility of innocence.

The facts which were adduced in this case were so remote with relation to appellant's involvement, that it is difficult to see how the jury did not find a reasonable doubt as a matter of law. One can only surmise that some of the evidence which the appellant contended was wrongfully admitted, such as discussed in Point I herein, played an undue role in his conviction. This is not a case like the case of United States v. Pacelli, supra, 70, which also dealt with the use of prior hearsay testimony where "there was substantial identical evidence in the record to support the appellant's conviction". In the case at bar, there was virtually no evidence of any substantial value. The only thing that remotely put appellant near the Sheraton Motor Inn at the time of the shooting was Agent CAFFREY's testimony that when he went outside to give the money to his fellow agent he heard a car peeling off as if it was making an escape (105-106, 152). However, the other agent, who was parked in his vehicle just across the street, said he heard nothing (411-412). No one saw the car, no one saw the appellant, and in all of the discussions with the two major perpetrators, NIEVES and MATTA, not one agent even saw

RIVERA or heard his name mentioned.

The only witnesses against appellant were convicts, who admittedly were seeking to help themselves reduce their jail time and testified with regard to nebulous statements made by appellant which seemed to incriminate him. Even so, HECTOR VIGO repudiated his prior Grand Jury testimony, and ARTEMIO ROSA had testified on the first trial that the appellant was not involved, but suddenly his testimony changed the other way (894-897). ROSA was serving a ten year sentence and had many narcotic charges against him (889), and it is difficult to see how his testimony, which was a mass of contradictions, could be pointed to to support this conviction. In addition, the government introduced what it contended was evidence of flight, the fact that appellant and his wife moved to Puerto Rico for a time. It is suggested that this evidence is really not relevant, since the shooting occurred in October, 1972 and appellant had not left until the end of February, 1973 or the beginning of March, 1973. It is difficult to see how a man would be fleeing from apprehension by the police and remain in New York for five months after he supposedly committed so serious a crime. According to the testimony of ROSA, appellant is alleged to have told him two days after the shooting that the authorities were looking for him, so it seems sensible that if he were going to flee, he would do so immediately. Further indication that ROSA's testimony was fabricated was the fact that Agent FERRARONE had previously testified that from February to May of 1973 they had no idea that RIVERA was the man they were looking for, and that he was not the subject of a search at that time (609). In view of that, and in view of the fact

that after the shooting no police gave chase to anyone, there is great doubt that the alibi of the appellant, that he was arrested for an automobile accident at the time of the shooting, was untrue.

The time element was so close in this case that in order for RIVERA to have reached the toll plaza on the Brooklyn side of the Battery Tunnel, he would have had to average approximately eighty miles per hour, according to the government's own witness (669-670). That seems impossible to have occurred, in view of defense expert testimony that the ride would take considerably longer than the government's claim (1270-1275, 1277), and in view of the testimony of Officer CAPORICCI, who arrested the appellant that appellant was drunk at the time of the accident. That officer not only gave his opinion that he believed appellant was drunk, but he testified to certain facts that the appellant had actually failed certain tests given to him in the precinct, such as the ability to touch his nose with his finger and other physical tests (720,733-735). Even WILLIAM SILVERBERG, the man who was originally supposed to participate in the robbery with NIEVES, said that RIVERA was not involved and he known that RIVERA was in any way connected with the scheme, he would never agree to participate, because they did not like each other (1114).

When the evidence that was adduced at this trial is examined carefully, it is impossible to conclude that appellant was proven guilty beyond a reasonable doubt. The waitress who picked out a picture of the appellant had to be mistaken, since it was never contended that appellant was even inside the premises, but only in the car waiting the completion of the robbery. She could not identify the pictures of

NIEVES and MATTA, and was in fact as sure that they were not there that night as she was that RIVERA was when she picked out his picture (1089 ). She probably confused RIVERA with TUMILLO, the deceased agent, who looked a good deal like RIVERA. The other employee at the hotel, the bartender, was able to correctly pick out the pictures of NIEVES and MATTA, but he did not identify RIVERA as having been there (1022-1025, 1035-1061).

The paucity of evidence, when combined with the Court's allowing the jury not only to consider the Grand Jury testimony of VIGO, but to consider appellant's movement to Puerto Rico on the issue of flight (15557-15558), combined to render the jury's verdict not reflective of the actual evidence introduced at the trial. Other factors which helped to combine to produce this undesirable effect were the Court's allowing the jury to have a look at exhibits, over strong objection, which contained a lot of items marked only for identification and not received into evidence (1569-1571, 1573). Included in this list was a lease apparently signed by appellant which was never received in evidence, and which was allegedly sought to be introduced on the theory that he had contracted for an expensive apartment, either showing he had a lot of money or that he really did not live in Staten Island, as he had stated. That specific exhibit was improperly before the jury.

At the time of sentence, the attorney alleged that the government had failed to comply with its Brady rule by not revealing that ARTEMIO ROSA may have been the same person as one ARTEMIO GONZALEZ, who the F.B.I. indicated was the one that was first thought to be the person they were looking for. A hearing should have been held on that issue

because if that were the case, the jury was absolutely entitled to know that ROSA may have been testifying in order to protect himself from possible prosecution for this very crime.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED  
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

PREMINGER, MEYER & LIGHT  
Attorneys for Defendant-Appellant  
66 Court Street  
Brooklyn, New York 11201

STANLEY M. MEYER  
Of Counsel

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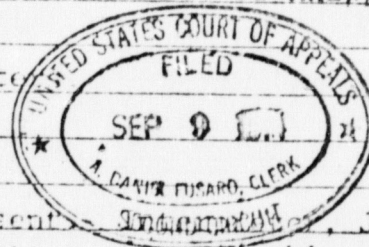
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CRIMINAL DOCKET

JUDGE WYATT  
~~JUDGE KNAPP~~

74 CRIM. 280

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
VS.	EUGENE F. BANNIGAN, AUSA
ISMAEL RIVERA, a/k/a "Pequilino"	264-6482
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(12)					
Fine,					
Clerk,					
Marshal, ✓					
Attorney,					
<del>XX</del> <del>Amount set on</del> <del>EX</del> <del>Cont.</del> T18					
<del>XX</del> <del>Amount set on</del> 1111, 1114 & 2					
Murder of Fed. agent. (Ct. 1)					
8:2114&2 (Robbery w/assault on					
person having custody of U.S. property (Ct. 2)					
8:111, 1114&2 Assault on Fed. agent. (Ct. 3)					
			(Three Counts)		
DATE	PROCEEDINGS				
-21-74	Filed indictment. Superseding 73Cr945, 73Cr1159 referred to Knapp, J.)				
-4-74	Filed C.J.A. 20 appointment of Court Reporter				
-18-74	Filed CJA 23 Financial affidavit.				
-1-74	Def. & atty. (Marvin Preminger, Esq.) present. Def. arraigned, through interpreter, on this superseding indictment & pleads not guilty to all counts. Jury trial begun.				
-2-74	Trial cont'd.				
-3-74	" "				
-4-74	" "				
-8-74	" "				



A TRUE COPY

RAYMOND F. BURCHARDT, Clerk

By Thompson  
Deputy Clerk

2A

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
4-9-74	Trial cont'd.		
4-10-74	" "		
4-11-74	" "		
4-15-74	" "		
4-16-74	" "		
4-17-74	" " & concluded; jury returns at 9:00 P.M.; jury disagreement.		
4-25-74	Pre Trial Conference held Deft. & Interpreter(Maria Elena Cardenas) present in court. Marvin Preminger Esq. assigned as counsel CJA. Trial 5/28/74 at 9:30 a.m. Wyatt J.		
4-29-74	Filed CJA 21 copy 2 approving payment of Ms. Maria Elena Cardenas 4/26/74 Wyatt J.		
4-29-74	Filed CJA 21 Copy 5 approving payment of Ms Maria Elena Cardenas 4/26/74 Wyatt J.		
4-30-74	ISMAEL RIVERA - Filed Order that Marvin Preminger, of 66 Court St., Bklyn, NY is hereby added to the Panel of attys. for the purpose of compensating him for his representation of the deft. Ismael Rivera at a retrial of this Indictment before Judge Wyatt & a copy of this order shall be filed with the USCA Second Circuit. Edelstein Ch. J. (mailed notice)		
4-25-74	ISMAEL RIVERA - Filed Order that Marvin Preminger, of 66 Court St., Bklyn, NY is hereby added to the Panel of Attys nunc pro tunc for the sole purpose of compensating him for his representation of deft. Ismael Rivera from 4/1/74 & that a copy be sent to the USCA Second Circuit. Edelstein Ch. J. (mailed notice)		
6-3-74	Trial adj. to June 10, 1974 @ 9:30 AM --- WYATT, J.		
6-10-74	Trial begun with a jury. (with an interpreter Eulalia Greenberg-sworn).		
6-11-74	Trial cont'd. (Interpreter Ricardo Mira, sworn).		
6-13-74	Trial cont'd.		
6-14-74	Trial cont'd.		
6-19-74	Filed CJA 21 -authorization for Court Reporters dtd. 6-11-74-Wyatt, J.		
6-19-74	Filed Gov't affdvt for a writ of habeas corpus for Luis Gomez Ortega. Writ Issued - Ret. forthwith.		

Civil Docket Continuation

## PROCEEDINGS

Date Order  
Judgment No.

-17-74	Trial cont'd.	
-18-74	Trial cont'd.	
-19-74	Trial cont'd.	
-20-74	Trial cont'd. Summations.	
-21-74	Trial cont'd. Court charges Jury. Jury deliberating. Jury finds the deft. guilty on each of counts 1, 2 and 3. Sentence Aug. 16, 1974, 2:30P.M. Pre-Sentence investigation ordered. Deft. cont'd. remanded in lieu of bail....WYATT,J.	
-26-74	Filed CJA 21 copy 2 authorization for payment for expert services to Ricardo Mira, Interpreter dtd 6-24-74....Wyatt,J. (original mailed to ADM. OFFICE).	
-26-74	Filed CJA 21 copy 5 authorization for payment for expert services to Ricardo Mira, Interpreter dtd 6-24-74....Wyatt,J.	
-26-74	Filed CJA 21 copy 2 authorization for payment for expert services to Ricardo Mira, Interpreter dtd 6-24-74....Wyatt,J. (original mailed to ADM. OFFICE).	
-26-74	Filed CJA 21 copy 5 authorization for payment for expert services to Ricardo Mira, Interpreter dtd 6-24-74....Wyatt,J.	
-27-74	Filed transcript of record of proceedings, dated April 2,3,4,8,9, 1974.	
-27-74	Filed transcript of record of proceedings, dated April 10,11,15,16,17, 1974.	
-12-74	Filed transcript of record of proceedings, dated April 1, 1974.	
-23-74	Filed transcript of record of proceedings, dated June 10,11,13,14,17, 1974.	
-23-74	Filed transcript of record of proceedings, dated April 25, 1974.	
-23-74	Filed transcript of record of proceedings, dated June 3, 1974.	
-23-74	Filed transcript of record of proceedings, dated June 18,19,20,21, 1974.	
-8-74	Filed CJA 21 appointing E.Greenberg interpreter.	
-8-74	Filed CJA 21 copy 2 approving payment to E.Greenberg interpreter -Duffy,J.	
-8-16-74	Filed JUDGMENT and COMMITMENT (atty present) It is adjudged that the deft is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of LIFE on count 1, TWENTY FIVE (25) YEARS on count 2. TEN (10) YEARS on count 3. Sentence on counts 2 and 3 to run concurrently with each other. Sentence on counts 2 and 3 to run consecutively with sentence imposed on count 1.....Wyatt,J.	
-9-74	Filed notice of appeal from the judgment of 8-16-74 and Order-Leave to proceed on appeal in forma pauperis, Granted., So Ordered....Wyatt,J. Mailed notice to Ismael Rivera, 427 West St., New York, N.Y. 10014 and U.S. Attorney's Office.	
-14-74	Filed CJA 20 copy 5 appointing Marvin Preminger as atty for Deft.	
-14-74	Filed CJA 20 copy 2 authorizing payment to Marvin Preminger dtd 6-11-74....Knapp,J.	
-14-74	Filed CJA 21 copy 5 appointing Joaquin R. Guma as interpreter.	

4A

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74 Cc.

PROCEEDINGS

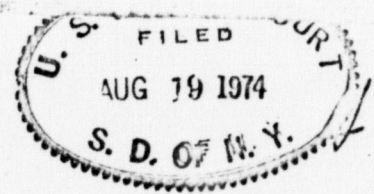
Date of  
Judgment

6-14-74

Filed GJ 21 copy 2 authorizing payment to Joaquin R. Guma dtd 6-11-74....Knapp, J.

5A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
United States of America :  
vs- :  
Ismael Rivera :  
aka "Peguilino" :  
-----X

Action Number 74 G. 280

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Notice is hereby given that Ismael Rivera  
above named, hereby appeals to the United States Court of  
Appeals for the Second Circuit from the \* Judgment  
of August 16, 1974.

Signed John P. Henry  
Attorney for

66 Court St  
Address

Notice to: DEPT. FED. DETENTION Leave to proceed on appeal  
HEADQUARTERS 427 WEST ST. in forma pauperis  
NEW YORK, N.Y. 10014 Shantel Sojourn  
U.S. ATTORNEY

\* Insert whether order or final judgment:  
or part thereof appealed from.

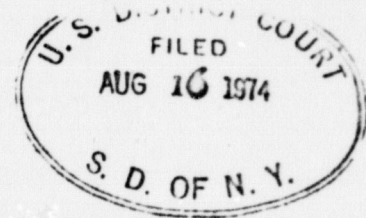
Myer Blyath  
U.S. D. S. M

United States of America

v.

ISMAEL RIVERA  
a/k/a "PEQUILNO"

No. 74 Cr. 280



On this 16th day of August, 1974 came the attorney for the government and the defendant appeared in person and<sup>1</sup> by Marvin Preminger, Esq. Interpreter Richard Schoen present in Court.

IT IS ADJUDGED that the defendant upon his plea of<sup>2</sup> not guilty, and a finding of guilty by a jury,

has been convicted of the offense of unlawfully, wilfully, knowingly, did murder and kill an employee of the Bureau of Narcotics and Dangerous Drugs, U. S. Dept. of Justice, and did assault and wound an employee of the U. S. Dept. of Justice, with intent to rob, steal and purloin money and property of the United States, by use of a dangerous weapon, to wit, a .38 caliber revolver.

(Title 18, U. S. Code, Sections 1111, 1114 and 2. Title 18, U. S. Code, Sections 2114 and 2. Title 18, Sections 111 and 1114.)

as charged<sup>3</sup> in counts 1, 2 and 3, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of<sup>4</sup> LIFE on count 1. TWENTY FIVE (25) YEARS on count 2. TEN (10) YEARS on count 3. Sentence on counts 2 and 3 to run concurrently with each other. Sentence on counts 2 and 3 to run consecutively with sentence imposed on count 1.

IT IS ADJUDGED that<sup>5</sup>

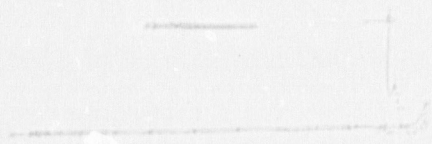
MICROFILM

AUG 20 1974

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to<sup>6</sup>

*Irving S. Breyer*  
United States District Judge.  
*Raymond F. Burghardt*



STATE OF NEW YORK, COUNTY OF

KINGS

ss.:

IRENE N. PHILLIPS being duly sworn, deposes and says: deponent is not a party to the action,  
is over 18 years of age and resides at

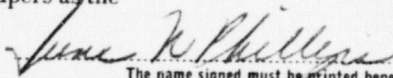
BROOKLYN, NEW YORK

☐ Affidavit of Service By Mail On December 4 19 74 deponent served the within BRIEF AND APPENDIX  
upon PAUL J. CURRAN, JR., United States Attorney, Southern District  
attorney(s) for in this action, at of New York, Foley Square, New York,  
New York the address designated by said attorney(s) for that purpose  
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official  
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at  
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the  
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on December 4 19 74

  
The name signed must be printed beneath  
IRENE N. PHILLIPS